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No. 10-74

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAVIER R. AQUINO, SECRETARY, PUERTO RICO DEPARTMENT OF AGRICULTURE, ET AL.,

Petitioners,

v.

SUIZA DAIRY, INC.;
VAQUERÍA TRES MONJITAS, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION OF RESPONDENT VAQUERÍA TRES MONJITAS, INC.

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CORPORATE DISCLOSURE STATEMENT

Vaquería Tres Monjitas, Inc. ("Tres Monjitas") is a for profit privately held corporation. Tres Monjitas has no parent company and no wholly owned subsidiary that has issued shares to the public.

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RESPONDENT VAQUERÍA TRES MONJITAS, INC.'S BRIEF IN OPPOSITION

The petition is based on two underlying false assumptions: (1) the district court ordered Commonwealth agencies to impose a tax on consumers as damages for past constitutional violations; and (2) Puerto Rico would be liable to pay a monetary judgment if that purported tax were unsuccessful. Neither of these assumptions are supported by the record. And, once these faulty assumptions are dispelled, which can be done in short manner, the petition seeks nothing more than review of a factbound, interlocutory appeal

The facts of this case are unique and extreme. The Commonwealth of Puerto Rico has total control over its milk market, including control over respondents' prices, costs, and profits. Respondents cannot change either the amount that they pay for raw milk or charge to consumers for processed milk without government approval. The district court found that financially interested private citizens had captured control of government agencies and the Government was forcing respondents to operate their businesses at a financial loss, threatening their financial solvency.

After finding likely violations of the Takings, Due Process, and Equal Protection Clauses, the district court issued a preliminary injunction designed to stabilize the milk industry. In part, the district court required petitioners to create a temporary mechanism that would allow respondents to rebuild their capital bases so as to avoid bankruptcy.

The district court, however, did not order petitioners to tax consumers and did not order any monetary relief, much less any monetary relief from the Commonwealth's treasury. Indeed, the district court provided that petitioners could use any "available mechanism of [their] choosing," including allowing respondents to earn a higher prospective rate of return. Pet. App. 197a. The Commonwealth chose to allow respondents to increase the price of milk going forward by 1 5 cents per quart.

In addition, there is no indication that the Commonwealth would be potentially liable for monetary damages if the market would not sustain the 1.5 cents price increase. Judge Torruella, who wrote the panel's decision, expressly stated that it would be "pure speculation" to suggest that the Commonwealth could be "legally, practically or potentially" liable to respondents. *Id.* at 52a (Torruella, J., concurring in the denial of rehearing en banc). The court of appeals held that no state funds would be used and, as Judge Torruella explained, petitioners never "*argued on appeal that the monies raised by the regulatory accrual are public in nature.*" *Id.* at 49a (emphasis in original). Accordingly, because state funds are not implicated and the Commonwealth is not even potentially liable for any monetary payment, the court of appeals held that the Eleventh Amendment does not prohibit the preliminary injunction.

When the case is properly viewed, its significance dims. There is no widespread application to other States and no suggestion that courts can force a State to tax its citizens to pay for monetary damages. Nor is the case inconsistent with the precedent of

this Court or any circuit Indeed, petitioners do not cite one case in which an Eleventh Amendment violation was found when no state funds were at risk and the State was not even potentially liable for payment.

Furthermore, even assuming counter-factually that a split could be divined from petitioners' cases, the petition presents an exceedingly poor vehicle for this Court's review. As the court of appeals explained, the record at this stage is unclear. No permanent injunction has been issued and how the preliminary injunction will work in practice is unknown. Additional threshold legal questions such as the applicability of the Eleventh Amendment to Puerto Rico and to Takings claims have yet to be worked out. In fact, the court of appeals did not even decide whether the preliminary injunction was retroactive; the court simply assumed so. Even if the Court were interested in addressing the Question Presented, there is no good reason for the Court to grant the petition at this time.

COUNTERSTATEMENT OF THE CASE

1. Respondents Tres Monjitas and Suiza Dairy, Inc. (collectively the "milk processors") purchase raw milk from dairy farmers, process the milk and sell the fresh milk to the public. At one time, there were over a dozen fresh milk processors in Puerto Rico. Today, respondents are the only fresh milk processors left.

Milk production in Puerto Rico is cyclical. The production is "heavily dependent upon the changing temperature, leading to instability in the seasonal yield of milk and, consequently, waste during months

of higher production." Pet. App 5a. The unstable production cycle led to tension between the dairy farmers and the milk processors and made the consistent supply of milk difficult. In 1957, Puerto Rico created the Office of the Milk Industry Regulation Administrator for the Commonwealth of Puerto Rico ("ORIL" by its Spanish acronym), an agency within Puerto Rico's Department of Agriculture, to "regulate all aspects of the Puerto Rican milk market." *Id.* at 78a.

At the same time ORIL was created, Puerto Rico also created the Milk Industry Development Fund ("FFIL" by its Spanish acronym), a government entity designed to promote Puerto Rico's fresh milk industry. *Id.* at 78a-79a. FFIL owns and operates Industria Lechera de Puerto Rico, Inc. ("Indulac"). Indulac processes ultra high temperature milk ("UHT milk"), "a type of milk that does not require refrigeration prior to opening." *Id.* at 4a. ORIL denied Suiza's application to process UHT and thus Indulac was the "sole entity in Puerto Rico authorized to process [UHT]." *Id.* Indulac's UHT milk "competes directly with the fresh milk produced" by the respondent milk processors. *Id.*

Originally independent entities, now "[b]oth the FFIL and Indulac are entities under the full control of the dairy farmers." *Id.* at 79a. In addition, "[t]he FFIL pays for ORIL's Administrator's automobile and other expenses" and "the Administrator of ORIL was also the Chairman of the Board of Indulac." *Id.* at 78a, 79a. The three entities share the same building. *Id.* at 79a.

As part of its regulation of the milk industry, ORIL set the minimum price that the milk

processors were required to pay dairy farmers for raw milk and set the maximum price that the milk processors could charge consumers for the fresh milk they processed. ORIL kept the price of fresh milk "low to make it affordable for consumers. The price of the raw milk, however, was kept high, based on ORIL's determinations regarding the farmers' costs of production and their reasonable expectations of profits." *Id.* at 5a-6a.

ORIL also required the milk processors to purchase all of the raw milk produced by the dairy farmers. The Puerto Rican fresh milk market, however, does not support processing all of the produced milk, leading to surplus raw milk. To avoid waste, ORIL required the milk processors to sell all of their surplus milk to Indulac. "Under ORIL's pricing system, Indulac purchased this surplus raw milk from the processors at a price significantly below the price that the processors paid the dairy farmers for their non-surplus raw milk." *Id.* at 6a.

In the mid-1980s, Indulac began using the surplus raw milk to process UHT. "Essentially, by mandating that plaintiffs pay a high price for raw milk and then requiring them to sell the surplus of that same milk to Indulac at a substantially lower price, ORIL created a scheme in which Tres Monjitas and Suiza were forced to subsidize Indulac, their competitor." *Id.* at 6a. Without this subsidy, Indulac would not have been able to compete with UHT milk imported from the United States. *Id.* at 6a-7a. "And, since Indulac was able to purchase its raw milk at a deflated price, UHT milk became significantly less expensive than fresh milk—a phenomenon unique to

Puerto Rico—causing Indulac's UHT milk to begin to dominate the Puerto Rican milk market." *Id.* at 7a.

Unlike for the milk processors, ORIL did not impose a maximum price for which Indulac could sell UHT. Because Indulac purchased its milk at a "deflated price" and had no restriction on the price for which it could sell UHT, Indulac's "profit margin ...soar[ed], while the processors struggled." *Id.* at 7a. "By the year 1998, Indulac was aggressively marketing UHT and devoting as much surplus milk as possible to its production." *Id.* at 94a-95a.

Although ORIL set the prices for raw milk, ORIL accepted the figures provided by Indulac without any hearing or examination. Thus, Indulac, which is under "full control of the dairy farmers," determined the "dairy farmers' costs and what constituted reasonable profits." *Id.* at 7a. Even during this litigation, ORIL relied solely on Indulac's figures to determine how much Indulac should pay for surplus raw milk. *Id.* at 8a. Additionally, ORIL's estimates were based on "clearly outdated economic figures" that failed to consider the "tremendous increase in prices of essential production elements" and the "consistent trend of reduced [milk] production." *Id.* at 9a. "Such determinations as to [the milk processors'] production costs, the price of raw milk, and the price at which they could sell fresh milk to consumers, allowed ORIL to control the milk processors' rates of return." *Id.*

Exacerbating the milk processors' financial condition, ORIL began to change the regulations governing the milk processors without any forewarning. ORIL, for example, did not "publish its rules of cost analysis," or "adopt a consistent and

scientific measurement of shrinkage, which represents the volume of milk regularly lost in the processing stage and is required for an accurate measurement of total production." *Id.* at 8a-9a. ORIL also failed to "follow a consistent standard in determining whether to allow income reductions for returns of product, . . . discounts to agents and promotions, and for the costs and fees of professional experts utilized by [the milk processors] to enable compliance with regulations." *Id.* at 9a.

As a result of ORIL's regulatory scheme, the milk processors began to operate at significant financial losses. ORIL refused to consider the milk processors' losses in setting future rates and continued to force the processors to operate at a loss.

2. Facing insolvency, the milk processors filed suit against petitioners, the Secretary of Agriculture and the ORIL Administrator, in their official capacities, in the United States District Court for the District of Puerto Rico in 2004. Later, both Indulac and the Puerto Rico Dairy Farmers intervened to assert additional defenses against the milk processors' claims.

The milk processors contended that ORIL's regulatory scheme violated the Due Process, Equal Protection and Taking Clauses of the United States Constitution and sought a preliminary injunction. Petitioners moved to dismiss the complaint based, *inter alia*, on Eleventh Amendment immunity, contending that the milk processors were seeking monetary damages. The district court rejected petitioners' argument, holding that "[i]n the instant case, [the milk processors] are seeking a prospective injunctive relief against [petitioners] to avoid

insolvency but they are not seeking damages nor a monetary compensation." *Id.* at 214a

a. After three years and fifty-one evidentiary hearings, the district court issued a preliminary injunction. The district court determined that the dairy farmers were using the Puerto Rican Government to try to bankrupt the milk processors. The court concluded that the dairy farmers wanted "to consolidate in their hands the control of the whole industry." *Id.* at 82a. The court explained that the dairy farmers' efforts to "eliminate[e] the fresh milk processors" continued while this lawsuit was pending and included "participation of officials of the Government of Puerto Rico involved directly and indirectly in the milk industry and its price setting scheme." *Id.* As the district court found, "[t]he more desperate the financial condition of the fresh milk processors, the easier for the dairy farmers to acquire or eliminate them." *Id.*

The district court found that petitioners had "intentionally squeezed plaintiffs between the cap of a fixed regulated price and an irrational high price for raw milk. . . . in order to protect Indulac. . . ." *Id.* at 168a. In addition, the record demonstrated "a pattern of lack of standards, change in standards with unfettered discretion, use of stale figures, and lack of an appropriate standard as to fair rate of return in the regulations set by the regulator." *Id.* at 192a. The court thus concluded that petitioners likely had violated the Equal Protection, Due Process, and Takings Clauses. *Id.* Because of petitioners' actions, the court found that the Puerto Rican milk industry was on the verge of collapse. Finding that respondents' continuing, independent

operation was in the public interest, the district court issued preliminary injunctive relief. Pet. App. 107a, 193a-194a.

b The district court's preliminary injunction attempted to stabilize the milk industry and prevent the bankruptcy of the milk processors. The district court required Indulac to pay the same price as the milk processors for raw milk. *Id.* at 196a. In addition, the court required ORIL's Administrator to conduct an economic study of Puerto Rico's milk market and "put into effect non-discriminatory, rational and scientific regulatory standards that will allow him to determine costs and fair profits return for all the participants in the Puerto Rico regulated milk market." *Id.* at 197a. The court also required the new system to have a mechanism to deal with losses that may occur between periods of review. *Id.*

Finally, and as relevant here, the district court ordered the creation of "a temporary mechanism that will allow the processors to recover the new rate of return" from 2003 (the beginning period of the "taking") until the new regulatory regime is implemented. *Id.* at 197a. The court allowed ORIL to determine the rate of return and how to implement the temporary mechanism, stating that "[t]he Administrator may so act through regulatory accruals, special temporary rates of return or any other available mechanism of his choosing." *Id.* The district court did not order any payment of money.

c. ORIL chose to implement the temporary mechanism by allowing the milk processors to increase the price of milk by 1.5 cents per quart. The milk processors collect this increase directly from the consumers through individual milk purchases.

While petitioners have proposed a regulation that would require the milk processors to turn over the funds from the price increase to ORIL, that regulation, has not yet taken effect. *See* Proposed Regulation No. 12 (Docket Nos. 938-4 & 1190-2), *Vaqueria Tres Monjitas, Inc.* v. *Laboy*, No. 04-1840 (D.P.R.). Thus, the milk processors currently retain control over funds received pursuant to the price increase.

4. Petitioners appealed to the First Circuit, contending that ORIL's price increase violates the Eleventh Amendment's prohibition on retrospective monetary awards. In a unanimous decision, the court of appeals rejected petitioners' argument because "[t]he damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief." *Id.* at 26a (quotation marks and citation omitted).

The First Circuit held, under the facts of this case, "the money in question would come directly from consumers of milk in Puerto Rico. . . . [I]t would be neither collected by government entities nor retained in [Puerto Rico's] treasury." *Id.* Since "no state action is required" for the individual consumer transactions, ORIL's temporary mechanism and the remedial scheme "would, in no way, reach the coffers of the Commonwealth," and the Eleventh Amendment did not preclude the district court's equitable relief. *Id.* The court found no support for the proposition that the Eleventh Amendment bars relief "*that does not reach the state treasury*" and affirmed the district court. *Id.* at 25a (emphasis in original). Accordingly, the court did not reach the

question of whether the district court's order could be considered retroactive. *Id.* at 24a.

5. The court also rejected petitioners' subsequent motion for rehearing en banc. Chief Judge Lynch dissented from the denial because she believed that state funds were at risk and that, if ORIL's temporary price increase failed, ORIL might be considered liable for monetary payments. *Id.* at 64a (Lynch, C.J., dissenting from the denial of rehearing en banc). The remainder of the court voted to deny rehearing en banc.

Judge Torruella concurred in the denial of rehearing en banc and wrote separately to dispel Judge Lynch's description of the price increase. Judge Torruella explained, "there is simply no indication in the record or in the Regulations adopted by ORIL that an eventual judgment ordering disbursal of the monies raised pursuant to the regulatory accrual would be satisfied by public funds." *Id.* at 49a (Torruella, J., concurring in the denial of rehearing en banc) Indeed, as Judge Torruella noted, petitioners never even "*argued on appeal that the monies raised by the regulatory accrual are public in nature.*" *Id.* (emphasis in original). Judge Torruella further emphasized that "*[n]either the Commonwealth nor ORIL have been adjudged responsible for contributing funds to the special account.*" *Id.* (emphasis in original). Judge Torruella thus explained that "the precise compensation that Plaintiffs will be entitled to receive has not been determined as of yet" and the suggestion that the Commonwealth may bear some subsidiary monetary liability is "beyond speculation"

on the present record.[1] *Id.* at 50a n.3; *see also id.* at 52a ("[I]t is pure speculation to state that the Commonwealth is legally, practically or potentially" liable to the milk producers.).

Judge Torruella concluded that the panel had properly considered, "from a practical perspective, the Commonwealth's immediate and ultimate liability," and its decision was "consistent with settled precedent that examines an entity's entitlement to sovereign immunity through the prism of the financial burden actually or potentially imposed on the state." *Id.* at 51a, 53a. As there is no threat to the monetary interests of Puerto Rico, Judge Torruella explained, the court rightly affirmed the district court. *Id* at 54a.

REASONS FOR DENYING THE PETITION

The petition should be denied because the court of appeals' decision does not raise any issue of national importance, is consistent with this Court's precedent, and does not create a split of authority among the circuits on the Question Presented. Moreover, even if the Court were interested in the Question Presented, myriad factors make this case a poor vehicle for this Court's consideration.

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[1] Both Chief Judge Lynch and Judge Torruella assumed that all funds collected from consumers were deposited in a state-administered account designated for payment to the milk processors. However, ORIL's proposed regulation creating this account has not been implemented. For approximately the last two years, the milk processors have retained control over the funds collected pursuant to the price increase.

I. THE PETITION DOES NOT RAISE ANY ISSUE OF NATIONAL IMPORTANCE.

The court of appeals decided this case under a unique factual scenario that is not widely applicable to the domestic States. The Commonwealth controls the milk industry. ORIL determines the price at which milk processors must purchase raw milk, forces the milk processors to purchase all available raw milk—regardless of their needs or capacities—and dictates the price at which the processors will sell the milk. According to the district court, ORIL's price scheme forced the milk processors to take annual losses and threatened their solvency. *Id.* at 118a. Unlike typical private companies, because the Commonwealth has total control over the milk processors' prices, costs, and profits, they had no way to adjust their businesses to recoup prior losses and stave off bankruptcy.

The district court faced the task of crafting effective prospective injunctive relief under exceptional circumstances. Recognizing that merely ensuring a fair rate of return at some future date would not resolve the milk processors' financial insolvency, the court ordered petitioners to implement a "temporary mechanism" that would allow the milk processors to rebuild their capital bases. The district court left the details of the "temporary mechanism" to petitioners, but suggested that a higher prospective rate of return would accomplish this directive. *Id.* at 197a. Rather than give up regulatory control, however, the *Commonwealth itself* decided to allow respondents to charge an additional 1.5 cents per quart of milk.

As the facts demonstrate, the district court did *not* order any monetary relief, much less order the Commonwealth to impose a tax to pay a judgment, as petitioners mistakenly suggest. Because the Commonwealth has total control over the private companies, it could have ensured the milk processors' financial solvency by, for example, prospectively reducing its regulation or eliminating the maximum price charged to consumers. Such relief would not even arguably be considered retroactive monetary relief. In fact, there is no question that the district court could have struck down the Commonwealth's entire pricing scheme and, consistent with *Ex parte Young*, 209 U.S. 123 (1908), prospectively enjoined petitioners from setting price controls, a far more intrusive remedy than the price increase the Commonwealth chose here.

Moreover, in the context of the regulatory scheme, even the Commonwealth's chosen relief cannot be considered retroactive monetary relief. Only where the Government has total control over a private company would the company's attempt to restore its lost capital through consumer transactions require any government action. In the ordinary case, a company could always increase prices or decrease expenses to recoup past operating losses. Such prospective actions are good business.

That the Commonwealth chose to allow the milk processors to temporarily increase their prices in future consumer transactions does not transform basic economics into retroactive monetary damages. The increased profit, if any, that the milk processors will receive will be dictated by the market. The

Commonwealth is not paying the price increase and is not liable for either a sum certain amount or any potential shortfall. If the market cannot sustain the increased price, the milk processors will not increase their profits and will continue to operate at a loss. The effect of the Commonwealth's chosen price increase is simply to allow the milk processors to operate like any other private company and recover from past operating losses through future consumer transactions.[2]

The unique facts of this case drove the need for prospective relief that would allow the milk processors to avoid financial insolvency. A similar factual scenario is unlikely to reoccur, and therefore the petition does not present any issue of widespread application or national importance.

II. The Court of Appeals' Decision Is A Factbound Application Of This Court's Precedent.

Petitioners' argument that the court of appeal's decision is inconsistent with this Court's precedent also depends on a mistaken factual premise. Petitioners primarily argue that the Eleventh Amendment is violated because the Commonwealth could be potentially liable for a monetary judgment. Pet. at 17-18. The court of appeals, however,

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[2] Put another way, imagine a situation in which the State of Texas unconstitutionally took property worth $1 million from a widget manufacturer. The Eleventh Amendment may prohibit the company from recovering $1 million in damages from Texas, but it does not prohibit the company from increasing the price of widgets to recoup the $1 million it lost from Texas's actions.

rejected that contention, and Judge Torruella specifically explained that any such argument is "pure speculation" based on the current record. Pet App. 52a (Torruella, J., concurring in the denial of rehearing en banc). Petitioners' challenge to the court of appeals' factual assumptions—particularly at this interlocutory stage—does not provide grounds for granting the petition. *NLRB* v. *Hendricks County Rural Elec. Mbrshp. Corp.*, 454 U.S. 170, 176 n.8 (1981).

1. Although the Eleventh Amendment prohibits citizen suits against a State in federal courts for monetary damages, *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974), citizens may sue state officials in their official capacity to compel compliance with federal law. *Ex parte Young*, 209 U.S. 123 (1908). Even though a State is not named a party to the action, when the action "is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Edelman*, 415 U.S. at 663 (quotation marks and citation omitted). "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*; *see also Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997).

In deciding whether an action is against the State for purposes of the Eleventh Amendment, this Court looks to whether state funds would satisfy the judgment. In *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Court explained "the

impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury." 513 U.S. at 48. Accordingly, the Court endorsed the analysis by the "vast majority of Circuits," whereby "the state treasury factor is the most important factor to be considered . . . and, in practice, [the courts] have generally accorded this factor dispositive weight." *Id.* at 49 (quotation marks and citation omitted).

The relevant question is not whether the funds actually are paid out of the state treasury, but whether the state treasury is liable or potentially liable for the payment. In *Regents of the University of California* v. *Doe*, *supra*, the Court held that monetary relief was barred against the State even though a third party would pay the damages pursuant to an indemnification agreement. The Court held that Eleventh Amendment immunity applies "when the action is in essence one for the recovery of money from the state," and thus depends on "whether a money judgment . . . would be enforceable against the State." *Doe*, 519 U.S. at 429, 430 (quotation marks and citation omitted). According to the Court, "[t]he Eleventh Amendment protects the State from the risk of adverse judgments." *Id.* at 431.

2. The court of appeals followed this Court's precedent in its decision. The court correctly held that the Eleventh Amendment was not implicated because "the money in question would come directly from consumers of milk in Puerto Rico. . . . [I]t would be neither collected by government entities nor retained in [Puerto Rico's] treasury." Pet. App. 26a. The remedy "would, in no way, reach the coffers of

the Commonwealth." *Id.* In short, the court of appeals' decision is consistent with *Edelman*, *Hess*, and *Doe*.[3]

Petitioners primarily dispute the court's characterization of the underlying facts. Like Chief Judge Lynch, petitioners contend that the court erred because, they hypothesize, the Commonwealth could be liable for any shortfall from the price increase, and the state treasury could be implicated. Pet. at 16-17; Pet. App. 64a (Lynch, C.J., dissenting from the denial of rehearing en banc).

But, the court of appeals expressly rejected petitioners' mistaken factual assumptions. As Judge Torruella explained in his concurrence to the denial of rehearing en banc, "*the Defendants have not argued on appeal that the monies raised by the regulatory accrual are public in nature.*" *Id.* at 49a (emphasis in original). And, there is no dispute that at least some of the money has never even been in

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[3] Petitioners argue that *Hess* is inapposite because it considered whether an entity is an arm of the State, not whether a state official can assert the Eleventh Amendment. But, petitioners miss the point, as this Court indicated in *Doe*, the two issues are substantively identical. *Doe*, 519 U.S. at 431. The question in either context is whether a lawsuit puts the State at risk of an adverse money judgment and therefore raises an Eleventh Amendment concern. *Id.* Where there is no risk of an adverse judgment against the State, as the First Circuit held was the case here, the Eleventh Amendment is not implicated. Pet. App. 26a. Furthermore, petitioners themselves seem to concede the relevancy of the analysis, as they proffer an arm of the State case, *Ernst* v. *Rising*, in support of their purported circuit split. Pet. at 12-13, *see also Ernst* v. *Rising*, 427 F.3d 351 (6th Cir. 2005) (applying a factor-based test in assessing whether a government retirement system constituted an arm of the State).

petitioners' possession or control.[4] Pet at 4. Moreover, as Judge Torruella explained, "*[n]either the Commonwealth nor ORIL have been adjudged responsible for contributing funds to the special account*," and "it is pure speculation to state that the Commonwealth is legally, practically or potentially" liable to the milk producers. Pet. App. 49a, 52a (Torruella, J., concurring in the denial of rehearing en banc) (emphasis in original). The court of appeals understood and correctly applied the law. If state funds were at risk or if the Commonwealth were potentially liable, the court would have decided the case differently.

Petitioners do not point to *any* precedent in which the Court has held that the Eleventh Amendment prohibits meaningful injunctive relief against state officials that does not potentially implicate payment from state funds. *See* Pet. at 10-15. To be sure, each of their cited cases involve funds administered by state benefit programs That is to be expected, as the potential liability of the state fisc is the primary factor to consider in determining the Eleventh Amendment's applicability.

Petitioners thus have only shown a potential, hypothetical dispute as to how the preliminary injunction might be carried out. They have not shown that state funds are ultimately at risk. There is no reason for this Court to grant the petition on an incomplete interlocutory record unsupported by determinative factual findings.

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[4] As noted *supra*, the milk processors currently retain control over the money collected from consumers under the price increase.

III. The Circuit Courts Are Not Split On The Question Presented.

Petitioners' suggestion of a circuit split fares no better. Petitioners contend that the circuits are divided on whether a court may "order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general treasury." Pet. at i, 10-15. Not one of petitioners' cited cases, however, actually addresses that question.

In each of petitioners' cases, a plaintiff sued the State, an arm of the State, or a state officer in his or her official capacity; alleged past injury from the wrongful withholding of government benefits; and sought an order directing the specific payment of state funds collected *ex ante*. Success in each case would have necessarily entailed a monetary judgment against the State for retroactive compensatory damages. The courts of appeals therefore held that the Eleventh Amendment barred these actions. *See Esparza* v. *Valdez*, 862 F.2d 788, 795 (10th Cir. 1988) (holding that the Eleventh Amendment precluded a "judgment for past damages" that ran "against the state"); *Paschal* v. *Jackson*, 936 F.2d 940, 945 (7th Cir. 1991) ("[I]n the end, any damage award is against the state."); *Fla. Ass'n of Rehab. Facilities, Inc.* v. *Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1221 (11th Cir. 2000) ("The district court judgment in this case effectively requires Defendants to . . pay[] Plaintiffs . . . out of the state treasury."); *see also Ernst* v. *Rising*, 427 F.3d 351, 362 (6th Cir. 2005) (holding "the state treasury would be subject to 'potential

legal liability' . . . to cover the judgment" (citation omitted)).[5]

Those decisions are unremarkable, consistent with this Court's precedent, and consistent with the court of appeals' decision in this case. As explained *supra*, the Eleventh Amendment protects the State against the risk of monetary damages paid by the state fisc. *See, e.g.*, *Hess*, 513 U.S. at 48; *Doe*, 519 U.S. at 431. Here, Puerto Rico *is not* "legally, practically or potentially" liable for paying any funds. Pet. App. 52a (Torruella, J., concurring in the denial of rehearing en banc). The court of appeals expressly held that the money is *not* state money under the unique circumstances of this case. *Id.* 26a. As Judge Torruella explained, the petitioners never even argued that the funds were public, *id.* at 49a, and petitioners cannot now contend otherwise. *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957) (declining to recognize contentions not raised in the court of appeals). Accordingly, the court of appeals' decision is based on the facts of the case and does not create a split of authority on the law.[6]

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[5] Plaintiffs also cite *Cronen* v *Tex. Dep't of Human Servs*, 977 F 2d 934 (5th Cir 1992), which does not implicate the Question Presented, nor petitioners' purported circuit split There, the court decided only that *Ex parte Young* does not allow a citizen to sue a "state *qua* state" for either monetary damages or injunctive relief *Id* at 938

[6] To the extent any split exists regarding whether the Eleventh Amendment is implicated where a third party will pay the judgment, as petitioners admit, that split was resolved by *Doe* and is now stale Pet at 13 (stating that no court had ordered "retrospective monetary relief against a sovereign since this Court's decision in *Doe*")

IV. This Case Is A Poor Vehicle For Deciding The Question Presented.

Finally, the interlocutory nature of the case and the complex threshold legal issues that must precede a determination on the merits make this case an exceedingly poor vehicle for review at this time.

1. The court of appeals' decision affirms a preliminary injunction issued to stabilize the milk industry and prevent the milk processors from going bankrupt pending adjudication of their claims. No final ruling on the merits has been made. Nor has the district court issued a permanent injunction.

Because of the interlocutory nature of the case, a great deal of confusion regarding the scope of the district court's injunction and the nature of the funds exists. The proposed regulation that would permit petitioners to assert control over the money in question has not been implemented, further complicating any analysis of the Eleventh Amendment implications. As Judge Torruella explained, at this point, it is "pure speculation" as to how this injunction will actually work in practice, and petitioners failed to provide any details of the "temporary mechanism" they unilaterally designed and adopted. Pet. App. 49a n.2, 52a. In addition, petitioners did not argue or build the record on appeal that the monies at issue are public funds. *Id.* at 49a. Accordingly, even if the Court were interested in addressing the factual arguments regarding the nature of the funds and the

Commonwealth's potential liability, the record is devoid of the necessary facts to do so.[7]

2. The petition also presents significant novel and difficult legal questions that would complicate the Court's resolution of the Question Presented.

a. As an initial matter, this Court has not decided that the Eleventh Amendment applies to Puerto Rico. By its terms, the Eleventh Amendment protects against lawsuits "commenced or prosecuted against one of the United States," and makes no reference to United States Territories or "sovereigns." U.S. CONST. AMEND. XI. At least two former justices, accordingly, have suggested that the Eleventh Amendment does not apply to unincorporated Territories such as Puerto Rico. *See Ngiraingas* v. *Sanchez*, 495 U.S. 182, 205 (1990) (Brennan, J., dissenting) ("[A]n unincorporated Territory . . . can have no immunity against a claim like the one here—a suit in federal court based on federal law."); *Balzac* v. *Porto Rico*, 258 U.S. 298, 305-07 (1922) (concluding that Puerto Rico is an unincorporated Territory). Because the parties have assumed that the Eleventh Amendment applies to Puerto Rico, the issue was not briefed nor addressed in the lower courts.

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[7] Following the district court's final disposition of the case, petitioners will be able to raise their current claims—together with any other claims that may arise as a result of the additional proceedings on remand—in a single petition for a writ of certiorari. *See Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

While the Court has assumed Puerto Rico to be protected by the Eleventh Amendment in a previous case, *see Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993) ("[E]xpress[ing] no view on this matter."), such a procedural posture certainly is not preferable. To be sure, such an assumption would purposefully avoid the potentially dispositive threshold legal issue—if the Eleventh Amendment does not apply, the entire exercise has been for naught—but yet the record in this case has not been developed so that resolution of the ultimate question is appropriate. *See Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 118 (1994) (dismissing as improvidently granted a writ of certiorari that would "require us to resolve a constitutional question that may be entirely hypothetical").

b. Further complicating matters, the district court's preliminary injunction was issued to remedy a Takings claim. There is currently an open question as to whether the Eleventh Amendment bars retroactive monetary compensation by the State for Takings claims. As this Court recognized in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 316 & n.9 (1987), "the Constitution . . . dictates the remedy for interference with property rights amounting to a taking" and, therefore, notwithstanding claims of immunity, retroactive monetary relief may be "required by the Constitution." This Court could not cleanly resolve the Question Presented without first addressing whether or not the Takings Clause abrogates Eleventh Amendment immunity. Even if the Court were interested in the Question Presented, a case that did not present this complicated

threshold legal question would be a much better vehicle.

c. Lastly, petitioners' arguments presume that the district court's relief is retroactive. The court of appeals, however, did not address that question but merely assumed it to be the case. And, that question is far from simple

The line between prospective and retroactive relief is not always distinct. *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) (citing *Edelman*, 415 U.S. at 667). This Court, thus, has held that an award of attorney's fees for past work is not retroactive. *Id.*; *see also Missouri* v. *Jenkins*, 491 U.S. 274, 284 (1989) ("[T]he Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State."). While these fees appeared to be retroactive in the sense that they were to compensate the plaintiff for work performed prior to the judgment, the Court held that the fees were "ancillary" to the prospective relief otherwise available and therefore permissible. *Hutto*, 437 U.S. at 690-93; *see also Quern* v. *Jordan*, 440 U.S. 332, 349 (1979) (injunction to notify class members that their federal suit is at an end and that they may wish to pursue existing state administrative procedures is "ancillary" to prospective relief already ordered).

Likewise, compensatory relief that is necessary to ensure meaningful prospective relief is not considered to be retroactive. The Court has held that an order requiring a State to pay for remedial educational programs designed to ensure that segregated students would be able to catch up to their peers "fit[] squarely within the prospective-

compliance exception" announced in *Ex parte Young*. *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977). As the Court explained, while the court could prospectively end the unconstitutional inequality through "judicial fiat," that would not "wipe the slate clean by one bold stroke." *Id.* at 290. Injuries from the antecedent violations would continue absent some additional action. Thus, even though the remedial educational programs were "'compensatory' in nature . . . they [we]re part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system" and therefore not barred by the Eleventh Amendment. *Id.*

Here, the Commonwealth's chosen price increase operates prospectively on future consumer transactions. The purpose of the injunction is to ensure that the milk processors do not go bankrupt from their past losses and to stabilize the milk industry. At a minimum, strong arguments exist that such relief is prospective because it is necessary to ensure effective relief or is at least ancillary to the remaining undisputed prospective relief. After all, like the ongoing effect of the constitutional violation in *Milliken*, the threat of bankruptcy is not eliminated simply because sometime in the future the milk processors will be allowed to make a profit. The distinction between prospective and retrospective relief is already murky, and for the Court either to assume the nature of the relief or to attempt to resolve it on an incomplete record merely risks engendering further confusion.

In sum, even if the petitioners were correct that the First Circuit's opinion will "'effectively eliminate the constitutional immunity' of Puerto Rico and

other sovereigns," Pet. at 20, surely a better vehicle in which to address the Question Presented will arise.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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